

Update: Crime Victim Rights Manual

CHAPTER 8

The Crime Victim at Trial

8.10 Expert Testimony on the Psychological Effects of Battering and Criminal Sexual Conduct

Replace the first paragraph and the quoted text of MRE 702 following the first paragraph on page 175 with this text:

Michigan Rules of Evidence 702–707 govern the use of expert testimony at trial. MRE 702* provides the standard for admissibility of expert testimony:

“If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Replace the second bullet on page 176 with the following:

After January 1, 2004, MRE 702, as amended, succeeds Michigan’s *Davis/Frye* rule as primary authority governing the admissibility of expert scientific testimony. The amendments made to MRE 702 eliminated the rule’s former requirement that expert testimony be derived from a “recognized” discipline. The amended rule’s omission of the word “recognized” impacts the efficacy of those previous Michigan court decisions that addressed the admissibility of expert testimony based on whether the information was classified as a product of those scientific or technical disciplines “recognized” as credible sources at the time of the decision.

The staff comment to amended MRE 702 states:

*The amended text of MRE 702 is effective January 1, 2004.

“The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words ‘the court determines that’ after the word ‘If’ at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.”

Daubert applies to scientific expert testimony; *Kumho Tire* applies *Daubert* to nonscientific expert testimony (e.g., testimony from social workers and psychologists or psychiatrists). *Daubert*, *supra* 509 US at 593–94, contains a nonexhaustive list of factors for determining the reliability of expert testimony, including testing, peer review, error rates, and acceptability within the relevant scientific community. See also MCL 600.2955, which governs the admissibility of expert testimony in tort cases, and which contains a list of factors similar to the list in *Daubert*.

To the extent that they do not conflict with MRE 702 and the guidelines contained in *Daubert* and *Kumho Tire*, cases decided under the *Davis/Frye* rule *may* provide guidance to trial courts to review the reliability of proffered expert testimony.

CHAPTER 9

Victim Impact Statements & Other Post-Disposition Procedures

9.5 Victim Participation in Parole Hearings

A. Parole Guidelines and Victim Impact Statements

Insert the following text after the bulleted information at the top of page 204:

Deciding an issue of first impression, the Michigan Court of Appeals held “that there is no requirement that the parole guidelines must conform to the sentencing guidelines.” *Morales v Michigan Parole Board*, ___ Mich App ___, ___ (2003). In *Morales*, the defendant argued that he was unfairly denied parole because the parole board failed to score the defendant’s parole guidelines consistently with scores received under the sentencing guidelines. *Id.* at _____. Citing to an Illinois court’s decision on a similar issue, the Court of Appeals explained:

“[T]he parole board here is not bound by the probation officer’s calculations in the presentence investigation report, but may consider them in addition to the prisoner’s institutional program performance, his institutional conduct, his prior criminal record, and any other relevant factor as determined by the Department of Corrections. MCL 791.233e(2). Likewise, the non-binding nature of the presentence report is in accord with Michigan law that parole boards have exclusive jurisdiction and discretion to parole a prisoner. MCL 791.204; MCL 791.234(9).” *Morales, supra* at ____.